

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

UNITED STATES OF AMERICA

v.

Case No. 8:03-CR-77-T-30TBM

HATEM NAJI FARIZ
_____ /

**DEFENDANT HATEM NAJI FARIZ'S MOTION FOR RECONSIDERATION
OF THE DATE SET FOR COMMENCEMENT OF JURY SELECTION**

Defendant HATEM NAJI FARIZ, by and through undersigned counsel, and pursuant to 18 U.S.C. § 3161(h)(8)(A) and M.D. Fla. Local R. 3.09(a), hereby respectfully requests that this Honorable Court reconsider the date set for commencement of jury selection. As grounds in support, Mr. Fariz states:

1. Trial is scheduled to begin on May 16, 2005. (Doc. 928).
2. On March 18, 2005, the Court issued a notice to the parties that jury selection was to begin April 4, 2005, and also reserved as an additional date for this purpose, April 11, 2005. (Doc. 939).
3. First, while Mr. Fariz recognizes, particularly based on the review of the completed juror questionnaires, that selection in this case is quite involved, Mr. Fariz believes that the risks of attempting jury selection six weeks prior to trial outweigh the benefits of such an early start. There are numerous motions affecting the evidence in this case that are pending and anticipated, including multiple motions to suppress and motions in limine. The issues arising in these motions may significantly affect issues arising during voir dire.

4. Second, because of the responses in the juror questionnaires, it is anticipated that motions for change of venue will be filed. A considerable amount of time and expense has been spent in hiring a jury expert to explore the necessity of this motion. The consultant will not have complete findings by April 4, 2005.
5. Finally, forty-two (42) days will elapse from the April 4, 2005 date set for commencement of jury selection to the May 16, 2005 date set for commencement of trial. In the interim between the beginning of jury selection and commencement of trial, the jury will be outside the supervision of the Court, making it nearly impossible for the Court and attorneys to ensure that the jurors are not affected by external influences, including the continuing news coverage of this case, and other local and world events that may affect the jurors' views. Furthermore, it is likely that events will occur in the interim between jury selection and trial, thereby affecting the lives of the individual jurors and changing their answers from those expressed during a potential April 2005 voir dire. This change would vastly affect use of cause and peremptory challenges for all parties involved.
6. Mr. Fariz recognizes the difficulty of finding potential jurors who have not been affected by the publicity of this particular case and/or the discriminatory attitudes toward Muslims since September 11, 2001. However, Mr. Fariz feels that the negative consequences of a lengthy interim between voir dire and trial outweigh this difficulty. In recognizing these difficulties, however, Mr. Fariz would instead propose that this Court require additional potential jurors to report on April 4, 2005 and, if needed, April 11, 2005 to complete additional juror questionnaires. By so doing, adding to the potential juror pool may alleviate the concern of finding a sufficient number of available impartial jurors, assuming a change of venue is not

ultimately necessary.

MEMORANDUM OF LAW

Standard of Review

The nature of this request is similar to that of a continuance, in which the Court may change the date for good cause shown. 18 U.S.C. § 3161(h)(8)(A); M.D. Fla. Local R. 3.09(a).

Argument

A substantial time period between jury selection and commencement of trial raises concerns with the parties' ability to adequately and effectively ensure that they can seat a fair and impartial jury, with the use of cause and peremptory challenges. While the parties have already begun the cause challenge process, the parties would note that peremptory challenges are "an important procedural element in the selection of a fair and impartial jury." *United States v. Capua*, 656 F.2d 1033, 1035 (5th Cir. 1981)¹. However, "peremptory challenges are worthless if trial counsel is not afforded an opportunity to gain the necessary information upon which to base such strikes." *United States v. Ible*, 630 F.2d 389, 395 (5th Cir. 1980).

"Events occurring during . . . a significant delay may have substantial effects upon the personality or preconceptions of the jury and seriously dilute the effectiveness of the prior exercise of peremptory challenges." *Price*, 573 F.2d at 363-364. A "significant delay" between jury selection and testimony may range from thirty-nine to forty-nine days. *See Capua*, 656 F.2d at 1036; *Price*, 573 F.2d at 363. In this case as at hand, there will be a forty-two day delay from the beginning of

¹In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions handed down by the former Fifth Circuit before October 1, 1981.

jury selection to the beginning of trial, well within the range set by *Price* and *Capua*. *See id.*

In *Price*, the court, citing “experience and human nature as authority,” discussed several potential events that could occur within such a “significant delay.” *Price*, 573 F.2d at 363-364. Jurors, their family members, or their friends could become associated with a victim, witness, or another person associated with the case. *Id.* at 364. Violence or unlawful activities could touch the life of the potential juror or someone he or she knows. *Id.* Further, particularly in the case at hand, world-changing events could occur at any moment. It is impossible to shield jurors from these possibilities for seven weeks. As the *Price* court stated, “[w]e only cite specific examples to illustrate that a person’s beliefs and prejudices can drastically change during a lengthy expiration of time.” *Id.*

In this case, the response to questionnaires the Court sent in January 2005 demonstrated that many of the more than three-hundred potential jurors revealed a deep-rooted animosity toward Arabs, Muslims, and Palestinians. These responses demonstrate the difficulty of finding a fair and impartial jury in this case. The responses therefore show how important cause and peremptory challenges will be in this case for two reasons. First, there are several motions pending and anticipated motions that may affect the evidence in this case. Mr. Fariz will not be able to use his peremptory challenges as effectively as if jury selection began after the disposition of the motions. Second, unforeseen events could change seemingly fair and impartial jurors in the six-week period from April 4 to May 16. Indeed, constant news coverage of this case particular and local news concerning other cases may affect jurors’ perceptions of whether they can be fair and impartial. It is impossible to predict what could occur in the media, the community, the world and individual potential jurors’ lives.

If the delay cannot be avoided, the Court must conduct supplemental voir dire. *Id.*; *Capua*, 656 F.2d at 1036. Failure to conduct supplemental voir dire, so long as the issue is properly preserved for appeal, results in reversible error on appeal. *Capua*, 656 F.2d at 1036. Therefore, voir dire will have to be conducted at the time of trial; either a second time with the delay, or as a first time without the delay. If voir dire will have to be conducted either way, it seems more efficient to only conduct it once.

The government, in previous conversations with counsel, voiced their agreement with the premise of this motion. However, counsel for Mr. Fariz has been unable to reach the government to afford them an opportunity to join. Therefore, Mr. Fariz individually makes this request, but with no known opposition from the government.

WHEREFORE, Mr. Fariz requests that this Honorable Court reconsider the April 4, 2005 and April 11, 2005 dates set for jury selection, and change the date for jury selection to the trial date, May 16, 2005. Instead, Mr. Fariz requests that this Court summon additional potential jurors to complete juror questionnaires on April 4, 2005 and, if necessary, April 11, 2005, but allow voir dire to begin on May 16, 2005.

Respectfully submitted,

R. FLETCHER PEACOCK
FEDERAL PUBLIC DEFENDER

s/ Kevin T. Beck
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of March, 2005, a true and correct copy of the foregoing has been furnished by CM/ECF, to Walter Furr, Assistant United States Attorney; Terry Zitek, Assistant United States Attorney; Cherie L. Kringsman, Trial Attorney, U.S. Department of Justice, Alexis L. Collins, Assistant United States Attorney; William Moffitt and Linda Moreno, counsel for Sami Amin Al-Arian; Bruce Howie, counsel for Ghassan Ballut; and to Stephen N. Bernstein, counsel for Sameeh Hammoudeh.

s / Kevin T. Beck
Kevin T. Beck
Assistant Federal Public Defender